1989

State of Utah v. Stuart D. Luschen : Brief of Respondent

Utah Court of Appeals

R. Paul Van Dam; attorney general; attorney for respondent.
Alan K. Jeppesen; attorney for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 890186-CA
v.	:	
STUART D. LUSCHEN,	:	Priority 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

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APPEAL FROM AN ORDER DENYING MOTION TO VACATE JUDGMENT IN THE THIRD JUDICIAL DISTIRCT COURT, IN AND FOR TOOELE COUNTY, STATE OF UTAH, THE HONORABLE PAT B. BRIAN, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This an appeal from an Order Denying Motion to Vacate Judgment in the Third Judicial District Court. Defendant was convicted of possession of a controlled substance with intent to distribute, a second degree felony. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(j) (Supp. 1989).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did the trial court abuse its discretion by denying the motion to withdraw the guilty plea after finding that the plea was voluntary?

2. Was defendant denied the effective assistance of counsel?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 77-35-11(e)(2) (Supp. 1989):

> The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings: . . . (2) That the plea was voluntary.

STATEMENT OF THE CASE

Defendant pled guilty to possession of a controlled substance with intent to distribute, a second degree felony, on April 11, 1988. This plea was entered in exchange for the State dismissing Count II of the information which charged possession of a firearm by a restricted person, a third degree felony. Judge J. Dennis Frederick sentenced the defendant to the Utah State Prison for a term of one to fifteen years and imposed a fine of $5,000 plus $1,250 surcharge.

Defendant moved to withdraw his guilty plea on December 14, 1988. Judge Pat B. Brian denied the motion on February 13, 1989, holding that the plea was voluntary and defendant was not coerced by the State. Defendant moved to vacate the order denying his motion to withdraw his plea on February 22, 1989. Judge Pat B. Brian denied the motion on March 23, 1989.

STATEMENT OF THE FACTS

Defendant pled guilty to Count I, possession of a controlled substance with intent to distribute, in exchange for dismissal of Count II, possession of a firearm by a restricted person. Defendant's attorney entered into plea negotiations with the State after defendant informed him he wanted to plead guilty and begin serving his sentence (R. 26). The State agreed to dismiss the third degree felony charge in exchange for defendant's guilty plea. Defendant's attorney explained the plea bargain agreement and the consequences of a guilty plea to defendant (R. 27).

The trial court asked defendant whether his plea was voluntary and if he understood his plea (T. 3-5). Defendant replied he was entering his plea voluntarily without any threats or promises (T. 3). He stated that he understood the affidavit and did not have questions for the court (T. 3). Defendant then signed the affidavit and the court accepted his guilty plea (T. 4, 6). Defendant waived the statutory waiting period for sentencing because he wanted to begin serving his sentence (R. 7-8).

SUMMARY OF ARGUMENT

Defendant's plea was voluntarily entered as the result of plea bargaining. The court questioned defendant about whether his plea was voluntary and not coerced. Defendant said it was voluntary and no promises were made to him other than those outlined in the affidavit. Thus, the court met the Rule 11 requirement and correctly determined the defendant's plea was voluntary.

Defendant was not denied the effective assistance of counsel. His attorney adequately represented defendant's interests and defendant was not prejudiced by the attorney's performance.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

A court may not accept a plea of guilty unless the "plea is voluntarily made." Utah Code Ann. § 77-35-11(5)(b)

(Supp. 1989). For a plea to be voluntary, a defendant must have "a clear understanding of the charge" and must make the plea "without undue influence, coercion, or improper inducement." State v. Forsyth, 560 P.2d 337, 338-39 (Utah 1977). In addition, a defendant "must understand the nature and value of any promises made to him." State v. Copeland, 765 P.2d 1266, 1274 (Utah 1988). Thus, a trial judge should conduct an "on the record examination of the defendant" to determine the defendant's understanding of the nature of the charge. Boykin v. Alabama, 395 U.S. 238, 244 n.7 (1969).

Defendant claims he pled involuntarily because of the "State's threat to charge defendant with being a habitual criminal" (Br. of App. at 9). He claims he pled guilty "only because of the promise not to file the habitual criminal charge" (Br. of App. at 6). Defendant maintains he would have "gone to trial rather than plead guilty" if he had known the State had no grounds to file a habitual criminal charge. (Br. of App. at 3.) However, as defendant admits, this allegation is unsupported by the record (Br. of App. at 9).

A defendant is not entitled to withdraw a guilty plea as a matter of right. State v. Gallegos, 738 P.2d 1040 (Utah 1987). This Court should not interfere with the trial court's decision on a motion to withdraw a plea unless the judge clearly abused his discretion. State v. Mildenhall, 747 P.2d 422, 424 (Utah 1987). The burden is on the defendant to establish good cause for the motion, Utah Code Ann. § 77-13-6(2)(a) (Supp. 1989), and to establish on appeal that the trial court abused its

discretion in denying the motion, State v. Larson, 560 P.2d 335, 336 (Utah 1977). Defendant has failed to carry his burden in both instances.

The record shows defendant voluntarily pled guilty to the second degree felony. Frank Mohlman, defendant's attorney, stated that defendant admitted he committed the acts and wanted to plead guilty prior to any plea bargain discussion (R. 26). Mr. Mohlman approached the prosecutor for a plea negotiation (R. 26). Once the State offered to allow defendant to plead to Count I and dismiss Count II, Mr. Mohlman explained the plea bargain to defendant and answered defendant's questions (R. 26-27). Mr. Mohlman never told defendant he would be convicted of a habitual criminal charge (R. 27). Furthermore, Mr. Mohlman thoroughly went over the affidavit with defendant and answered all his questions concerning the contents of the affidavit. Defendant appeared to Mr. Mohlman to have a full understanding of the contents and never claimed he was pleading guilty because of any threat, coercion, or promise except what was agreed upon and is in the affidavit (R. 28).

The trial judge questioned defendant to determine the voluntariness of his plea (T. 5). Defendant stated he understood the affidavit, that his plea was voluntary, and that no threats or promises were made to him (R. 3, 5). Defendant admitted his guilt and stated he was anxious to fulfill his sentence (T. 4, 8).

Furthermore, defendant's affidavit stated he was entering his guilty plea in exchange for the State dismissing the

third degree felony charge and that there were "[n]o other promises" (R. 8). In Hurst v. Cook, 113 Utah Adv. Rep. 3 (Utah 1989), the defendant claimed he pled guilty to a second degree felony but was sentenced for a first degree felony. The court upheld the conviction even though the information misnamed the offense. Id. at 7. The court stated that defendant's signed plea document, executed on the day defendant pled guilty, reflected the nature of the plea negotiation and the information indicated the offense was a first degree felony. Id. Thus, the defendant's plea was entered with knowledge of its legal consequences. Id.

In this case, defendant also signed an affidavit. This affidavit reflected the nature of the plea negotiation and was discussed in court. Thus, defendant was aware of the nature of the plea bargain and voluntarily entered his guilty plea based on the dismissal of the third degree felony.

Defendant has failed to prove his plea was involuntary. He wanted to plead guilty to begin serving his sentence before the plea negotiation began. There is nothing in the record supporting defendant's claim that he would not have pled guilty if he knew the State could not file habitual criminal charges. Since there is nothing in the record to support this allegation, it should be disregarded. State v. Smith, 700 P.2d 1106, 1109 (Utah 1985).

Defendant also claims the court failed to discover if his plea was voluntary because the court did not ask whether the affidavit included the entire plea agreement of the parties;

thus, his motion to withdraw the plea should have been granted (Br. of App. at 10). This argument is without merit because the Judge did ask if there were any other promises made to defendant that were not in the affidavit (T. 3).

In State v. Gibbons, 740 P.2d 1308, 1313 (Utah 1987), the court stated that an affidavit may be used to promote efficiency, but it is only a starting point for the judge. A judge should still question the defendant concerning his understanding of the affidavit and review it with the defendant to fulfill the Rule 11 requirements. Id. Recently, however, the Court held that an affidavit may be relied on to establish the nature of plea negotiations. Hurst, 113 Utah Adv. Rep. at 7. In the present case, the trial court relied on an affidavit to reflect the nature of the plea negotiation, but, the judge also referred to the affidavit on the record and questioned defendant's understanding of its contents (T. 2-3). Judge Frederick asked defendant whether he had been threatened or promised anything other than the promise to dismiss Count II (T. 3). After defendant denied any threats or promises, he replied he was acting of his own free will, and indicated that he understood the consequences of the plea, the judge accepted his guilty plea (T. 5-6). Thus, the trial court met the requirements of Rule 11 and Gibbons on this issue.

Defendant argues this case as if the prosecutor made a promise to defendant and then did not fulfill this promise. See App. Br. at 6-7. He also cites the standard for evaluating a pre-judgment motion to withdraw a guilty plea as if it applies to

this case. See App. Br. at 7 citing State v. Gallegos, 738 P.2d 1040 (Utah 1987). Neither of these standards apply here.

First of all, this was a post-judgment motion to withdraw and the liberal standard of Gallegos does not apply. The standard of review here is whether the trial court abused its discretion in finding no good cause and denying defendant's post-judgment motion to withdraw his plea. See Utah Code Ann. §77-13-6 (Supp. 1989), and State v. Vasilacopulos, 756 P.2d 92 (Utah Ct. App. 1988).

Second, the prosecutor made no promise here that he failed to fulfill. At worst, perhaps, the prosecutor could be accused of having made an illusory promise, i.e. a promise not to file a habitual criminal allegation that held no benefit for defendant but was made with the illusion of a benefit. See State v. Copeland, 765 P.2d 1266, 1274 (Utah 1988). The record does not support, however, a finding that the prosecutor made an illusory promise. Mr. Mohlman's affidavit states that the possibility of a habitual criminal allegation was discussed and that the State was looking into the possibility of such a charge (R. 26 at 5). When a plea agreement was reached, however, the State simply dropped its investigation into that issue (Id.). Thus, no promise was made to defendant other than that the State would not pursue that avenue. Judge Brian specifically found that defendant's plea was not coerced by any threat by the State to file a habitual criminal allegation. Findings of Fact contained in Order Denying Motion to Withdraw Guilty Plea, copy in Appendix A. This finding is not clearly erroneous based upon

the record before Judge Brian. Utah R. Civ. P. 52(a) (1989); Jolivet v. Cook, ___ P.2d. ___, ___, No. 880341, slip op. at 4 (Utah Aug. 22, 1989).

There is no indication in the record whether, in fact, such a charge would have been possible other than defendant's allegation that it would not. This Court should not speculate as to what the State would have found had it continued its investigation into the issue. It is clear that Mr. Mohlman explained the "nature of an habitual criminal allegation" to defendant (R. 26 at 5). Because this plea took place, at defendant's request, so soon after Mr. Mohlman began representing defendant, it is entirely conceivable that Mr. Mohlman relied on defendant's own knowledge of his record to allow defendant to make an intelligent decision whether such a charge would be possible. Defendant faults Mr. Mohlman for failing to investigate his record; nevertheless, defendant was in the best position to know whether he had a sufficient record in Utah or other states to support the charge. If the State's promise not to further investigate the habitual criminal allegation was illusory in light of the requirements for such a charge that were explained to defendant, it is strange that defendant did not point that out to his attorney at the time.

Significant are defendant's clear desire not to have the court obtain a presentence report because it would establish that defendant had a prior record, and his desire to proceed immediately to sentencing even though counsel advised against it (T. 8). Defendant chose to inform the court about some of his

record that the prosecutor already knew about. These facts undermine his claim that the prosecutor made an illusory promise. The prosecutor very well may have discovered sufficient previous convictions to support a habitual criminal allegation had he continued his investigation. There is nothing in the record to support defendant's bare allegation that he had no further record than he admitted at the time of his plea. Moreover, the "rap" sheet included in defendant's brief is not part of the record and is not a basis for finding that Judge Brian abused his discretion in denying the motion to withdraw the plea. State v. Cook, 714 P.2d 296 (Utah 1986) (references to matters outside the record are inappropriate and irrelevant and will not be considered).

Defendant received exactly what he bargained for. The State did not further investigate or charge him with habitual criminal and it dropped Count II of the information. The fact that the plea affidavit did not include a promise that defendant actually received should not invalidate defendant's plea. Because there is no record supporting defendant's claim that he could not have been charged as a habitual criminal, this Court should find that the lower court correctly exercised its discretion in denying the motion to withdraw the guilty plea.

Moving beyond defendant's claim that the prosecutor made an illusory promise, the State recognizes that Judge Frederick did not fully advise defendant on the record at the time of his plea of the rights he was waiving by pleading guilty. Specifically, he did not advise defendant of his rights against compulsory self-incrimination, to a jury trial and to confront

the witnesses against him, see Utah R. Crim. P. 11(5)(c) (1989) (the 1989 amendment renumbered but did not substantively change this provision), nor that the State has the burden to prove the elements of the crime beyond a reasonable doubt, see Rule 11(5)(d). This Court recently stated in State v. Valencia, ___ P.2d ___, ___, 112 Utah Adv. Rep. 42, 43 (Utah Ct. App. 1989), that it will consider a Rule 11(5) omission raised for the first time on appeal because it is "sufficiently manifest and fundamental to be first raised on appeal . . .." In this case, defendant has failed to raise the issue even on appeal. For this reason, this Court should find that defendant has waived the issue.

In the event that this Court finds the error to be sufficiently manifest to consider it sua sponte, the error should be reviewed in light of recent developments in the guilty plea area. Recent opinions of the Utah Supreme Court clarify State v. Gibbons, 740 P.2d 1309 (Utah 1987), as it relates to the "record as a whole" standard of review applied in a line of cases beginning with Warner v. Morris, 709 P.2d 309 (Utah 1985). Based upon the analysis below, even if this Court reaches the issue, it should find that defendant's plea was valid.

Jolivet v. Cook, ___ P.2d ___, No. 880341 (Utah Aug. 22, 1989), finds that although the trial judge did not strictly comply with Rule 11 when Jolivet entered his plea,

> '[t]he absence of a finding under [section 77-35-11] is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was

> waiving.' State v. Miller, 718 P.2d 403, 405 (Utah 1986); Brooks v. Morris, 709 P.2d 310, 311 (Utah 1985); Warner v. Morris, 709 P.2d 309, 310 (Utah 1985).

Slip op. at 3-4. Interestingly, Judge Billings of this Court sat in place of Justice Stewart in Jolivet. Decided prior to Jolivet, State v. Copeland, 765 P.2d 1266 (Utah 1988), also applies the record as a whole test. The Copeland court said:

> The United States Supreme Court has said, "[T]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." McCarthy [v. United States], 394 U.S. [459,] 470 . . . (emphasis in the original). We think the most effective way to do this is to have a defendant state in his own words his understanding of the offense and the actions which make him guilty of the offense. By this statement, the trial court can assure itself that the defendant is truly submitting a voluntary and knowing plea. Moreover, the record on appeal will clearly reflect the defendant's understanding. Although this method is therefore preferable to others, it is not absolutely required. The test is voluntariness.

765 P.2d at 1273 (footnote omitted). These cases make it clear that the test is whether the record as a whole establishes that the plea is voluntary, knowing and intelligent. This Court's holdings in Valencia, and State v. Vasilacopulos, 756 P.2d 92, 94 (Utah Ct. App. 1988), that "[s]trict, and not just substantial, compliance with the rule [that the examination must be by the court on the record at the time of the plea] is required," Valencia, slip op. at 3, are inconsistent with recent Utah Supreme Court rulings and should not be followed.

Furthermore, this "strict compliance" test is also inconsistent with Gibbons and other case law previously decided by the Supreme Court. A close reading of Gibbons reveals that the Court was simply pointing out the much preferred and safest method of determining the voluntariness of a plea. The Supreme Court had before it in Gibbons a transcript of the plea hearing, 740 P.2d at 1310-11. Since the Court was able to review the transcript and determined that the examination of the defendant was inadequate, it seems likely that they would have remanded the case with an order that the plea be withdrawn rather than remanding for a hearing on the issue of voluntariness if they intended to impose a rule of strict Rule 11 compliance. This viewpoint is reinforced by Copeland's clear statement that strict Rule 11 compliance is not absolutely required when a guilty plea is otherwise voluntary.

The State agrees that it is much preferred to have all of these findings on the record at the plea hearing. In some cases, however, judges have overlooked certain aspects of Rule 11 at the time of the plea. Where there is a record that establishes that the defendant pled voluntarily, knowingly and intelligently, it seems unnecessary to invalidate a plea simply because the judge overlooked parts of the Rule 11 examination in court.

For example, in State v. Kay, 717 P.2d 1294 (Utah 1986), the Court held that violations of Rule 11 do not automatically invalidate an otherwise voluntary plea. The Court stated:

> A final word on the State's Rule 11 arguments. In its zeal to set aside Kay's guilty pleas or renege on the bargain that was struck, the State has argued, in effect, that otherwise voluntary and lawful guilty pleas should always be voided when the trial court violates any provision of Rule 11. The concurring opinions of Chief Justice Hall and Justice Howe adopt this reasoning as well. This position is short-sighted, for to follow it would be to sanction a remedy far worse than the wrong. If we were to hold that any violation of Rule 11 automatically voids the resultant plea, even when the plea is knowingly and voluntarily entered, we would encourage defendants, convicted and sentenced after such a plea to attack their convictions for purely tactical reasons, either by direct appeal or by seeking habeas corpus long after the fact. We have refused to overturn convictions upon such challenges in the past and we find no reason to encourage such attacks in the future.
>
> Overturning such convictions--which we would have to do if we embraced the rationale advanced by the State and the Chief Justice's concurring opinion--would require the State to reprosecute numerous defendants, probably long after the challenged guilty pleas were entered and when the passage of time would make reprosecution impractical, if not impossible. Almost certainly, the ultimate result would be to free a number of convicted persons for nothing more than technical errors in the acceptance of their voluntary guilty pleas.

Kay, 717 P.2d at 1301-02 (footnote and citations omitted). Importantly, Gibbons did not overrule Kay. Nor did it even cite to Kay, Miller, Brooks or Warner. Given the Utah Supreme Court's recent reliance on the Miller, Brooks and Warner line of cases, it does not appear that it was mere oversight that the Court did not overrule these cases. Instead, it appears that the record as a whole test remains viable even after Gibbons.

It may be argued that Copeland and Jolivet represent cases where the Supreme Court was applying the record as a whole test only because the pleas were entered before Gibbons was decided. This argument gains some support from the Court's recent refusal to apply Gibbons to a pre-Gibbons plea on the theory that the Gibbons decision was a clear break with the past and consequently not retroactive. See State v. Hickman, ___ P.2d ___, ___, No. 880305, slip op. at 3, n. 1 (Utah Aug. 17, 1989).

Hickman, although troublesome, is not controlling when closely analyzed. First, it is a per curiam decision. Second, it ignores that the Court applied the record as a whole test in Jolivet after stating the Gibbons requirements but without distinguishing the case on the basis that it was a pre-Gibbons plea. The Court did not even cite Gibbons in Copeland, thus, indicating no concern that Gibbons was inconsistent with its holding. Notably, the Court does not even state the date of Jolivet's plea and mentions only in passing the date of Copeland's plea without assigning any particular significance to the date. The Court's willingness to apply the record as a whole test in these two cases without explaining that there was any reason other than that it is the test to be applied indicates that the Court believes just that--that the test is voluntariness, not strict compliance with rigid Rule 11 recitations. Were it otherwise, it is likely that the Court would have overruled Miller, Kay, Brooks, and Warner; or at least have expressly limited their application to pre-Gibbons cases. The Court simply has done neither and this Court should

reconsider its rigid application of a strict Rule 11 compliance standard with this line of cases in mind.

Evaluating this case under the record as a whole test, this Court can find that defendant was advised of his constitutional rights as Judge Brian found. See Findings of Fact, contained in Order Denying Motion to Withdraw Guilty Plea, copy in Appendix A. In the affidavit, which Judge Frederick referred to in open court, defendant was fully advised of the constitutional rights that he was waiving (R. 6-7). Judge Frederick did not stop with asking defense counsel whether defendant understood the affidavit (T. 2-3). He also specifically asked defendant if he understood the affidavit and whether he had any questions about it (T. 3). These references, along with defendant's signature on the affidavit, establish that defendant was adequately advised of the rights he was waiving.

Even though Gibbons instructs that trial courts should not rely on defense attorneys to explain a defendant's rights to him, this instruction was based upon the fear that defendants simply come into court and do whatever their attorneys tell them to do. See, e.g., 740 P.2d at 1313. In this case, however, defendant did not simply stand mute and do what his attorney told him to do without asking other questions of the court. When Judge Frederick was explaining that he was amending the affidavit to reflect the actual charge to which defendant was pleading guilty, defendant initially indicated that he did not understand what Judge Frederick was doing (T. 5). The Judge explained himself further and defendant then indicated understanding. If

defendant did not understand other parts of the affidavit, it seems likely that he would have said so when asked. Since he said he understood it, this Court should find that it was sufficient to advise defendant of the rights he was waiving by pleading guilty.

Furthermore, the record indicates that defendant was not new to the criminal justice system. He had been previously convicted of burglary in Utah and had other charges pending in other states at the time of his plea (T. 9). From defendant's pro se pleadings, it appears that he has a good command of the English language and could have understood what he was reading in the affidavit. See R. 13-21, 23-4, 43-8, 54-62, 68-72. Judge Brian was not required to believe defendant's later claims that he did not understand the affidavit when he stated on the record at the time of the plea that he did understand it and, therefore, Judge Brian's ruling was not clearly erroneous. Jolivet v. Cook, No. 880341, slip op. at 4 (Utah Aug. 22, 1989).

POINT II

DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

A defendant is guaranteed the right to the effective assistance of counsel. State v. Crestani, 771 P.2d 1085, 1089 (Utah App. 1989). To substantiate a claim of ineffective assistance of counsel, a defendant must show both that "counsel's performance was deficient [and] that the deficient performance prejudiced the defense." State v. Grueber, 110 Utah Adv. Rep. 29, 33 (Utah App. 1989). To establish prejudice a defendant must show that a "reasonable probability exists that, but for

counsel's error, the result would have been different." Id. If both tests are not proven, "then defendant's ineffectiveness claim is defeated." Id.

Defendant claims Mr. Mohlman was ineffective because he did not explain to him that the State could not file a habitual criminal charge. However, Mr. Mohlman did not investigate this because it was not a part of the plea bargain.

Defendant indicated to Mr. Mohlman that he wanted to plead guilty before the State offered its plea bargain (R. 26). Mr. Mohlman then entered into plea negotiations with the State (R. 26). Mr. Mohlman discussed the negotiations with defendant, explained the nature of the habitual criminal allegations, and answered his questions (R. 26-27). Furthermore, Mr. Mohlman examined the State's evidence and determined that sufficient evidence existed so as to allow a jury to find the defendant guilty of both charges in the information (R. 27). Mr. Mohlman then discussed the evidence with defendant and gave him a professional assessment of the evidence (R. 27). Also, Mr. Mohlman explained the affidavit and the plea bargain agreement with defendant (T. 2; R. 28). Thus, Mr. Mohlman represented defendant's interests in court and in the plea negotiations. Furthermore, Mr. Mohlman counseled defendant and provided him with legal advice. Advising someone to plead guilty to a crime to which they admit guilt is not the basiis for an assertion of deficient performance. Mr. Mohlman provided adequate representation and, therefore, the first test is not met.

In addition, defendant was not prejudiced by Mr. Mohlman's failure to inquire into the grounds for filing an habitual criminal charge. Defendant received a more lenient sentence than he would otherwise have received because the third degree felony charge was dismissed. If this case were remanded back to the lower court, that charge would be reinstated and defendant would be subject to the possibility of a greater sentence. Thus, defendant benefitted from the plea bargain Mr. Mohlman negotiated. He also benefitted because, as noted above, the State did not further investigate the possibility of the habitual criminal charge. The record does not disclose whether the State would have found support for the charge had it continued to investigate. Defendant did admit that he had a prior record and specifically declined a presentence report. Mr. Mohlman would have been justified in concluding that defendant felt the possibility of being adjudged an habitual criminal was real given that Mr. Mohlman did explain the nature of the allegation to defendant.

CONCLUSION

Based upon the foregoing, the State requests this Court to affirm defendant's convictions.

RESPECTFULLY submitted this 31st day of August, 1989.

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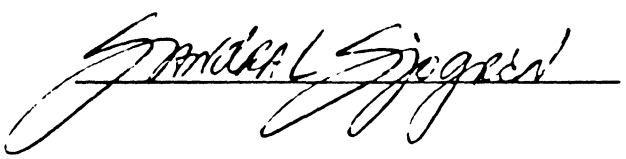
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Alan K. Jeppesen, attorney for defendant, 85 North Main Street, Tooele, Utah 84074 this 31st day of August, 1989.



APPENDIX A

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

* * * * * * * *

THE STATE OF UTAH,	)	
	)	**ORDER DENYING MOTION TO**
Plaintiff,	)	**WITHDRAW GUILTY PLEA**
	)	
Vs.	)	
	)	
STUART DEAN LUSCHEN,	)	**Case No. CR88-020**
	)	
Defendant.	)	

* * * * * * * *

This matter came on before the above-named court on the 13th day of February 1989, the Honorable Pat B. Brian presiding. The matter came before the Court on Defendant's Motion to Withdraw Guilty Plea and upon Defendant's Notice of Hearing which noticed the Motion For Hearing before the above-named court on February 13, 1989, at 10 a.m. Defendant was not personally present before the Court, he having failed to obtain an Order of Transportation from the District Court directing that he be transported to the hearing by the Department of Corrections. The State was represented by Mark W. Nash, Deputy Tooele County Attorney.

The Court called the matter and Mr. Nash entered his appearance. After ascertaining that Defendant was not present, the Court inquired of Mr. Nash as to how the State desired to proceed. Mr. Nash responded that unless the Court desired to hear oral arguments and receive testimony, the State was willing to submit the matter based upon the memoranda and documents submitted by the parties. The Court thereupon made the following findings of fact and conclusions of law and entered the following order:

FINDINGS OF FACT

The Court, having reviewed the documents on file including the Guilty Plea Affidavit of Defendant dated April 11, 1988, the transcript of the arraignment and sentencing of Mr. Luschen which took place on April 11, 1988, the Motion to Withdraw Guilty Plea and Memorandum in support thereof filed by Defendant and the Memorandum in Response to Defendant's Motion to Withdraw Guilty Plea together with the Affidavit of Frank Mohlman filed in support thereof by the State, as well as all other relevant documents, finds:

1. That Defendant's entry of a guilty plea to the charge of "Possession of a Controlled Substance With Intent to Distribute" on April 11, 1988, was done voluntarily and with a full understanding of the following:

   a. The elements of the offense to which Defendant plead guilty; and

   b. The minimum and maximum sentences that could have been imposed for the offense to which Defendant plead guilty, including the possibility of the imposition of consecutively sentences; and

c. That any recommendation as to the sentencing from any person, including the prosecutor, is not binding upon the Court: and

d. That by pleading guilty, the Defendant waived the following constitutional rights:

i. The right to testify in his own behalf; and

ii. The right against compulsory self-incrimination; and

iii. The right to confront and cross-examine the witnesses against him: and

iv. The right to a speedy, public trial by an impartial jury of the County or District in which the offense was alleged to have been committed; and

v. The right to have compulsory process to compel the attendance of witnesses in his own behalf; and

vi. The right to appeal.

2. The Court further finds that Defendant's plea of guilty was not coerced by any party nor was that plea of guilty entered in response to any promises or threats made to or against Defendant by any party except by the promise of the State to move for dismissal of Count II of the Information then pending against Defendant (Possession of a Firearm by a Restricted Person, a Third Degree Felony) in return for Defendant's plea of guilty to Count I of the Information. The Court specifically finds that Defendant's plea of guilty was not coerced by any threat of the State to file habitual criminal charges against Defendant should

he fail to plead guilty. The Court further finds that Defendant fully understood the details of the plea agreement entered into and that the State complied with the promises it had made as part of the plea negotiations. The Court also finds that there was a factual basis for the entry of the guilty plea and that the Defendant was competent to enter that guilty plea.

3. The Court further finds that Defendant was informed that his case could be referred to the Department of Adult Probation and Parole for the preparation of a presentence report should Defendant so request. The Court finds that Defendant voluntarily and knowingly waived the preparation of such a report despite having been advised to the contrary by his attorney. The Court further finds that Defendant voluntarily waived the minimum time in which to be sentenced and asked to be sentenced immediately following his entry of guilty plea.

4. The Court further finds that Defendant was represented by competent counsel during the entire arraignment and sentencing process and that the advice and representations given to Defendant by his attorney were appropriate and accurate.

CONCLUSIONS OF LAW

Based upon the foregoing findings, the Court concludes that all applicable rules and case law were complied with by the Court in the receipt and acceptance of Defendant's plea of guilty and in the sentencing of Defendant on April 11, 1988. The Court further concludes that Defendant, by his knowing, intelligent and voluntary entry of a plea of guilty,

waived any challenge to the sufficiency of the evidence against him and that he may not now raise such issues.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law the Court hereby orders Defendant's Motion to Withdraw Guilty Plea denied. The Judgment and Sentence entered by Judge Dennis Frederick on April 11, 1988, shall remain in ful force and affect and Defendant shall remain in the custody of the Department of Correctior s pursuant to the provisions of that Judgment and Sentence.

DATED this 17 day of February, 1989.

District Court Judge

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Order Denying Motion to Withdraw Guilty Plea to Stuart Dean Luschen, Box 250, Draper, Utah 84020, postage prepaid, this 16 day of February, 1989.